

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,
Plaintiff,
v.
TROY X. KELLEY,
Defendant.

| No. CR15-5198RBL

GOVERNMENT'S MOTION FOR INQUIRY CONCERNING POTENTIAL CONFLICTS OF INTEREST

Comes now the United States of America, by and through Annette L. Hayes, United States Attorney for the Western District of Washington, and Andrew C. Friedman, Kathryn Kim Frierson, and Arlen R. Storm, Assistant United States Attorneys for said District, and files this Government's Motion for Inquiry Concerning Potential Conflicts of Interest.

I. INTRODUCTION

The Government respectfully requests that the Court conduct an inquiry into potential conflicts of interest that could affect the ability of Defendant, Troy Kelley's, counsel, Mark Bartlett, to represent him in this case. The Government expects that part or all of the inquiry that the Government is seeking would be conducted *ex parte*, since the inquiry would involve questions concerning attorney-client communications. The Government requests that – following the inquiry and to the extent possible – the Court

1 provide the parties the results of that inquiry, following which the parties should be
 2 permitted to brief the effect of any conflicts upon defense counsel's continued
 3 representation.

4 II. FACTS

5 Kelley is charged with a series of crimes stemming from his operation of a
 6 business, United National, LLC, d/b/a Post Closing Department, during the years leading
 7 up to and including 2008. The majority of the potential conflicts of interest at issue relate
 8 to a pot of money that included at least \$1.4 million that Kelley stole through his
 9 operation of Post Closing Department, and that is involved in a number of the crimes
 10 with which Kelley is charged. The most significant potential conflicts stem from
 11 Kelley's recent transfers of the money remaining in the pot: \$447,421 to the United
 12 States Treasury and \$908,397 to the trust account of the law firm of Davis Wright
 13 Tremaine LLP.

14 A. The Stolen Money

15 As set forth in the Indictment, Post Closing Department provided reconveyance-
 16 tracking services to escrow companies. Indictment ¶ 5. Individuals who borrow money
 17 to purchase or refinance a home generally are required to transfer title to the home to a
 18 trustee, who holds that title on behalf of the lender, pursuant to a deed of trust, to secure
 19 repayment of the loan. *Id.* ¶ 6. When the underlying loan is repaid in full, the trustee
 20 executes a deed of trust transferring title back to the borrower. *Id.* This deed of trust is
 21 recorded in public land records. *Id.* The entire process is called "reconveyance." *Id.* In
 22 some cases, trustees charge a fee to prepare and process a deed of trust (a "trustee fee"),
 23 and county recording offices generally charge fees to record a reconveyance (a "county
 24 recording fee"). *Id.*

25 During the years leading up to 2008, escrow companies that facilitated real estate
 26 closings generally collected \$100 to \$150 from borrowers, at the time of closing of the
 27 transaction in which they were selling or refinancing a property, to ensure that the escrow
 28 companies held sufficient funds to cover costs that might be associated with

1 reconveyance, including trustee fees and county recording fees. *Id.* ¶ 8. Kelley
 2 represented to escrow companies that Post Closing Department would take custody of the
 3 entire fee paid by borrowers, that it would track reconveyances for the escrow companies
 4 for a flat fee of \$15 or 20 per reconveyance (the amount varied depending upon the
 5 escrow company), that Post Closing Department would pay any necessary trustee fees
 6 and county recording fees, and that it would refund any unused moneys to borrowers. *Id.*
 7 ¶¶ 14-15, 32-34.

8 In fact, major lenders processed the vast majority of reconveyances that Post
 9 Closing Department tracked. *Id.* ¶¶ 18, 28. As a result, Post Closing Department
 10 generally did not need to pay any trustee fees or county recording fees to effect the vast
 11 majority of reconveyances. *Id.* ¶ 18. Instead of returning unused reconveyance fees to
 12 borrowers, however, Kelley and Post Closing Department kept the money, all the while
 13 continuing falsely to represent that Post Closing Department was charging a flat fee of
 14 only \$15 or \$20 per reconveyance for its work. *Id.* ¶¶ 20-24, 39-41.

15 Because Kelley was not refunding to borrowers unused fees that he should have
 16 refunded, Kelley accumulated large balances in the bank accounts that held the money.
 17 *Id.* ¶¶ 30, 46. In the years leading up to and including 2008, Kelley neither declared this
 18 money as income on United National's tax returns, nor reported it on his own personal
 19 tax returns, to which the income from United National's tax returns ultimately flowed.
 20 *Id.* ¶¶ 47-54.

21 After class actions lawsuits were filed against escrow companies seeking the
 22 return of unused reconveyance fees, Kelley rapidly transferred the money he had failed to
 23 refund through a series of bank accounts in different names. *Id.* ¶¶ 61-66. Thus, within
 24 less than a month, Kelley transferred more than \$3.6 million (at least \$1.4 million of it
 25 money Kelley had failed to refund):

- 26 (1) to a newly-opened account at Wells Fargo bank in the
 27 name of United National,

1 (2) to a newly-opened account at U.S. Bank in the name of
 2 United National,

3 (3) to a newly-opened account at Nevada State Bank in the
 4 name of Blackstone International, Inc. (an S Corporation
 5 owned by Kelley that held a majority interest in United
 6 National), and

7 (4) finally, to a newly-opened account at Vanguard in the
 8 name of Berkeley United, LLC, itself a newly-established
 9 corporation, that was 99%-owned by Wellington Trust, also
 10 newly-established, a Belizean trust controlled by Kelley.

11 *Id.* ¶¶ 61-67. Count 1 of the Indictment charges Kelley with possession of stolen
 12 property, namely stolen money in the Berkeley United account at Vanguard.

13 **B. Kelley's Statements About/Treatment of the Stolen Money**

14 Over the years, Kelley made inconsistent statements about the stolen money, and
 15 treated the money inconsistently, in ways relevant to the charges pending against him and
 16 to the potential conflicts of interest raised in this motion. For example, in
 17 communications with an accountant, and in a document on the letterhead of a business
 18 named Attorney Trustee Services (ATS), Kelley suggested that United National's files
 19 had been transferred to ATS, which would continue to perform work on existing
 20 reconveyances and would earn income as it performed the work.

21 When he was deposed in 2010 in a civil suit brought against him by Old Republic
 22 seeking the return of reconveyance fees that should have been refunded to borrowers,
 23 however, Kelley claimed that he had not stolen the money. Kelley stated that he was
 24 entitled to charge additional fees beyond his flat fee, that he had performed a
 25 reconciliation after shutting down his business, and that he had determined that all of the
 26 money transferred to the Berkeley United account represented "fees earned" for "services
 27 provided." *Id.* ¶¶ 80-81. Notwithstanding that statement, in May 2011, Kelley settled the
 28 lawsuit and repaid Old Republic \$1,050,000 million drawn from the money in the
 29 Berkeley United account at Vanguard. *Id.*

1 Despite his claim in his deposition that he had earned all of the money transferred
 2 to Vanguard, Kelley admitted that he had not paid income tax on the money. *Id.* ¶ 81.
 3 Kelley attempted to explain this by saying that, although he had “earned” the money, the
 4 income had not yet been “realized.” *Id.* Following the settlement with Old Republic,
 5 beginning in 2011, Kelley began withdrawing \$245,000 annually from the remaining
 6 money that he had transferred to Vanguard. *Id.* ¶¶ 83-84, 88, 94. Kelley transferred this
 7 to accounts in the name of Blackstone International and reported the \$245,000 as income
 8 on income tax returns that he filed for Blackstone International (but offset a substantial
 9 portion of the income by claiming fraudulent business deductions). *Id.* ¶¶ 83-85, 91.
 10 Kelley reported on the income tax returns that the \$245,000 withdrawals came from an
 11 “impound account.” *Id.* ¶ 95.

12 And, finally, in April 2013, Kelley was interviewed by IRS Special Agents. *Id.* ¶
 13 92. Notwithstanding his prior testimony in his deposition that he had earned the money,
 14 Kelley explained his failure to declare the money as income on his 2006-2008 tax returns,
 15 and his reporting of \$245,000 of income annually beginning in 2011, to the IRS Special
 16 Agents by once again claiming that Kelley’s company was continuing to earn income by
 17 continuing to perform work on old reconveyance files. *Id.*

18 **C. Kelley’s Legal Representation**

19 Following his April 2013 interview by IRS Special Agents, Kelley retained Robert
 20 McCallum and the law firm of LeSourd & Patten, P.S., to represent him in connection
 21 with the Government’s investigation. The Government understands that Kelley’s wife,
 22 who owned a company that was a part owner of United National but who had little
 23 substantive involvement in the business, initially retained Mark Bartlett and the law firm
 24 of Davis Wright Tremaine LLP to represent her in connection with the investigation. By
 25 no later than 2014, Mr. Bartlett apparently had ceased to represent Kelley’s wife, and
 26 Kelley had retained Mr. Bartlett to represent him.

27 Since 2014, Mr. McCallum and Mr. Bartlett have jointly represented Kelley in
 28 dealings with the Government. After Kelley was charged in this case, both Mr.

1 McCallum and Mr. Bartlett entered conditional appearances on behalf of Kelley at
 2 Kelley's initial appearance. Docket No. 7. Mr. Bartlett subsequently entered a formal
 3 appearance in the case. Docket No. 11. Mr. McCallum filed a notice of non-
 4 representation. Docket No. 12. Mr. McCallum has indicated to the Government that he
 5 continues to represent Kelley along with Mr. Bartlett, and that he may, at some point in
 6 the future, file an actual appearance, and appear, in this case.

7 Because Mr. McCallum has not entered an actual appearance, this Motion for
 8 Inquiry focuses on actual or potential conflicts that could affect Mr. Bartlett's
 9 representation. In the event that Mr. McCallum enters an appearance, the Government
 10 would have additional concerns concerning potential conflicts that could affect Mr.
 11 McCallum's representation of Kelley, and likely would seek an inquiry concerning those
 12 conflicts of interest.

13 **D. The Potential Conflicts of Interest**

14 The potential conflicts at issue relate primarily to actions Kelley took after
 15 retaining Mr. McCallum and/or Mr. Bartlett. Kelley continued to withdraw \$245,000
 16 annually, each year through 2015, from the money that he had transferred to Vanguard.
 17 *Id.* ¶ 92. And, on February 7, 2014, Kelley filed a tax return for the year 2013 for
 18 Blackstone International. On that return, as he had done in the preceding two years,
 19 Kelley reported that Blackstone had earned \$245,000 of income during the year 2013.

20 By March 2015, the remaining amount in the pot of money at Vanguard (which
 21 Kelley had transferred in 2012 from the Berkeley United account at Vanguard, to an
 22 account in the name of Blackstone International at Vanguard, and from which he had, by
 23 2015, made five \$245,000 withdrawals) had been reduced to \$1,355,843. *Id.* ¶ 94. On
 24 March 26, 2015, after defense counsel had been told that Kelley was likely to be indicted
 25 on April 15, 2015, Kelley wrote two checks on this account, which reduced the balance in
 26 the account to zero. *Id.* ¶ 95.

27 Thus, Kelley wrote a check to the United States Treasury for \$447,421. On the
 28 memo line of that check, Kelley wrote "Form 1040 2016-2020." Kelley submitted this

1 check to the IRS under cover of a letter written by Mr. McCallum that stated that the
 2 payment related to “a disputable item of income tax” and asked that it be “designated as a
 3 payment of tax for [Kelley’s] 2016 through 2020 Form 1040 income taxes.” In addition,
 4 Kelley wrote a check for the remaining \$908,397 in the Vanguard account, payable to the
 5 trust account of the law firm of Davis Wright Tremaine. Mr. Bartlett since has
 6 communicated to Government counsel that this amount represented “retainers.”

7 These payments represent Kelley’s conversion to his personal benefit of money
 8 that Kelley previously had represented to the IRS on his tax returns was being held in an
 9 impound account (presumably for the benefit of third party escrow companies or
 10 borrowers). It also is money that Kelley told IRS Special Agents in April 2013 he had
 11 not yet earned, and for which his company still was performing work. As a result,
 12 Kelley’s contradictory treatment of this money is important evidence that the
 13 Government will seek to introduce at Kelley’s trial.

14 The government does not know to what extent these payments may have been
 15 made based upon advice from counsel and, in particular, Mr. Bartlett, Mr. McCallum, or
 16 other lawyers at either of their law firms. To the extent that the payments were based on
 17 such advice, and particularly upon advice from Mr. Bartlett or a lawyer at the law firm of
 18 Davis Wright Tremaine (or that Kelley believes that the payments were made in reliance
 19 upon such advice, since Mr. Bartlett and the law firm presumably were aware of the
 20 source of the money), Kelley would have a possible advice-of-counsel defense and Mr.
 21 Bartlett would face a conflict of interest in representing Kelley in this case for the reasons
 22 discussed in Part III below.

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III. ARGUMENT

A. Legal Framework

It is well established that a criminal defendant has a constitutional right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Effective assistance of counsel means representation that is untrammeled and unimpaired, *Glasser v. United States*, 315 U.S. 60, 70 (1942), and requires representation by an attorney with undivided loyalty and free from conflicts of interest. *Strickland*, 466 U.S. at 688, *United States v. Partin*, 601 F.2d 1000, 1006 (9th Cir. 1979).

Because of the importance of effective assistance of counsel, defendants do not have an absolute right to counsel of choice. Courts have “an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” *United States v. Wheat*, 486 U.S. 153, 160 (1988). Thus, there is “a presumption in favor of [] counsel of choice, but that presumption may be overcome not only by a demonstration of an actual conflict but by a showing of a serious potential for conflict.” *Id.* at 164.

Moreover, as *Wheat* noted,

Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those familiar with criminal trials. . . .

For these reasons . . . the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict.

1 | *Id.* at 163.

2 | Among the situations that may require disqualification of an attorney are cases in
 3 | which an attorney has provided legal advice to a defendant, so that the defendant has a
 4 | potential advice-of-counsel defense. For example, in *United States v. Evanson*, 584 F.3d
 5 | 904 (10th Cir. 2009), a defendant charged with a variety of tax-fraud related offenses,
 6 | based upon his operation of a business that assisted clients in committing tax fraud, sent
 7 | letters to two clients as the scheme was unravelling, which the government considered
 8 | evidence of a cover-up. The defendant sought to be represented in his criminal case by a
 9 | lawyer who apparently had reviewed one letter and who supposedly had suggested the
 10 | defendant contact the other client.

11 | The district court disqualified the attorney, and the Tenth Circuit affirmed. The
 12 | Tenth Circuit noted that the possible advice-of-counsel defense relating to this evidence
 13 | presented multiple issues. First, it could implicate the lawyer in allegedly unlawful acts.
 14 | In that case, a conflict would arise if the attorney were constrained from making certain
 15 | arguments, or tempted to minimize his own conduct at the expense of the defendant. *Id.*
 16 | at 913. Second, even if the defendant waived such a defense, the defendant later could
 17 | challenge his conviction claiming that his lawyer had rejected the defense based on his
 18 | own self-interest. *Id.* at 913-14.

19 | And, alternately, if the defendant sought to pursue an advice-of-counsel defense,
 20 | the lawyer's representation would engender other problems at trial, because the lawyer
 21 | "could become an unsworn witness who 'subtly impar[e] to the jury his first-hand
 22 | knowledge' . . . , thereby giving his client an unfair advantage. *Id.* at 914 (quoting
 23 | *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993)). In addition, presentation of the
 24 | defense would waive any privilege, and would expose the lawyer to being called by the
 25 | government and having to provide testimony against his own client. *Id.* Given these
 26 | facts, the Tenth Circuit held that the district court did not exceed the "broad latitude" to
 27 | which it was entitled when it disqualified the lawyer. *Id.*

1 Similarly, in *United States v. Swafford*, 512 F.3d 833 (6th Cir. 2007), a defendant
 2 charged with possession and sale of iodine with the intent or reasonable cause to believe
 3 it would be used to manufacture methamphetamine sought to be represented by a lawyer
 4 at a law firm with which he allegedly had consulted about his actions. The district court
 5 disqualified the lawyer, finding that he could not represent the defendant consistently
 6 with the Tennessee Rules of Professional Conduct, and also that the Government had
 7 demonstrated “a serious potential for conflict,” needed to disqualify a lawyer over a
 8 defendant’s objection under *Wheat*. *United States v. Swafford*, 2005 U.S. Dist. LEXIS
 9 26890 (E.D. Tenn. 2005). The Sixth Circuit affirmed the disqualification, noting that the
 10 district court appropriately had explained the conflicts that it believed might arise during
 11 trial, notwithstanding the defendant’s waiver of an advice-of-counsel defense. *Swafford*,
 12 512 F.3d at 841.

13 As suggested by *Swafford*, one factor that courts consider in determining whether
 14 an attorney may represent a defendant is the need to ensure that any such representation
 15 would be consistent with applicable rules of professional conduct. Rule 83.3(a)(2) of the
 16 local Civil Rules of this Court, which is made applicable to criminal cases by Rule 1 of
 17 the local Criminal Rules, provides that the Washington Rules of Professional Conduct
 18 apply to practice in this Court. Local Rules for the Western District of Washington
 19 LCR 83.3(a)(2), CrR 1. Rule 3.7(a) of the Washington Rules of Professional conduct
 20 provides that “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely
 21 to be a necessary witness unless: (1) the testimony relates to an uncontested issue; . . . or
 22 (4) the lawyer has been called by the opposing party and the court rules that the lawyer
 23 may continue to act as an advocate.” Washington Rule of Professional Conduct 3.7(a).

24 Significantly, though, even if representation is permissible under the applicable
 25 rules of professional conduct, disqualification of an attorney may be warranted. As the
 26 *Evanson* court noted, “Rule 3.7 cannot supplant constitutional standards. Even if a
 27 specific conflict of interest is addressed by a rule of professional conduct, such a rule
 28 cannot define the scope of a defendant’s Sixth Amendment rights. True, rules of

1 professional conduct are relevant in the sense that a court's authority to disqualify
 2 counsel stems in part from its interest in ensuring that criminal trials are conducted within
 3 the ethical standards of the profession. But it does not follow that the Sixth Amendment
 4 requires courts to identify a strict violation of an applicable ethical rule before
 5 disqualifying counsel." *Evanson*, 584 F.3d at 910 (internal quotations and citations
 6 omitted).

7 **B. Kelley's Case**

8 **1. The March 26, 2015, Payments from the Vanguard Account**

9 The two payments from the Blackstone International account on March 26, 2015 –
 10 namely the \$447,421 payment to the United States Government and the \$908,397
 11 payment to the trust account of Davis Wright Tremaine – present multiple potential
 12 conflicts of interest that are relevant to Mr. Bartlett's ability to represent Kelley.

13 Kelley is charged in Count 1 with possession of stolen property based upon his
 14 possession of money that Kelley transferred to the Berkeley United account at Vanguard,
 15 and that was the source of the money remaining in the Blackstone International account
 16 on March 26, 2015. Kelley is charged in Counts 8 and 9 with failing to declare some of
 17 that money as income in 2008. And Kelley is charged in Count 10 with false statements
 18 based upon his statement to IRS Special Agents that he had not yet earned the money in
 19 the Vanguard accounts but was earning it by continuing to perform work.

20 The payments to Davis Wright Tremaine and to the United States Government
 21 constitute evidence that – contrary to his statements in tax returns and to IRS Special
 22 Agents – Kelley in fact possessed and controlled the money in the Vanguard account,
 23 rather than holding it in impound for the benefit of third parties. If Kelley in fact
 24 believed that the money appropriately should be held in an impound account (as he
 25 represented on tax returns) because he had not yet earned it (as he represented to IRS

1 Special Agents), Kelley could not plausibly have decided in March 2015, that he was
 2 entitled simply to convert the money to his own benefit.¹

3 As a result, the March 26, 2015, transactions – and the change in Kelley’s
 4 treatment of, and claims about, the money in the Vanguard accounts that they reflect –
 5 constitute evidence that Kelley stole the money, and therefore also evidence of the crimes
 6 with which Kelley is charged in Counts 1, 8, 9, and 10. And they are evidence that the
 7 Government will certainly seek to introduce at trial.

8 To the extent that Kelley made these payments in reliance upon advice from Mr.
 9 Bartlett, or from any other attorney at Davis Wright Tremaine (or that Kelley believed
 10 that any such attorney approved the payments – which, at a minimum, appears likely
 11 since Davis Wright Tremaine was the recipient of one of the payments), Kelley would
 12 have a possible advice-of-counsel defense. The availability of such a defense would raise
 13 many of the concerns considered in *Evanson* and *Swafford*. Those concerns would
 14 include concerns regarding Mr. Bartlett’s potential personal interest in minimizing his or
 15 his law firm’s involvement which would undercut any advice-of-counsel defense, the fact
 16 that Mr. Bartlett might be placed in a position in which he was both an advocate and an
 17 unsworn witness, and the possibility that Mr. Bartlett might be required to cross examine
 18 other lawyers at his firm or might himself be subject to being called as a witness and
 19 examined concerning his advice to his client.

20 Even if the payments were not made in reliance upon advice from Mr. Bartlett or
 21 another attorney at Davis Wright Tremaine, if they were made in reliance upon advice
 22 from Mr. McCallum (which appears likely in the case of at least the payment to the
 23 United States Treasury, since that payment was made under cover of a letter written by
 24 Mr. McCallum), Mr. Bartlett would face potential conflicts of interest that would
 25 implicate some of the issues discussed in *Evanson* and *Swafford*. Specifically, because

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 27 ¹ Although a taxpayer using accrual-basis accounting – as Blackstone International purported to do -- may spend
 28 revenue that it receives before it actually earns the income by performing the services for which the revenue was
 received, that is not the case here. The evidence at trial will establish that Kelley was not in fact continuing to
 perform services or to earn the revenue.

1 Mr. Bartlett and Mr. McCallum have jointly represented Kelley for a substantial period,
 2 and continue to do so, Mr. Bartlett might well have been present and involved when any
 3 advice was given, and might be perceived by the jury as an unsworn witness.

4 Finally, regardless of whether Kelley has a possible advice-of-counsel defense, the
 5 Government believes that it will be required to call some witness from Davis Wright
 6 Tremaine to testify that the money transferred to the firm was transferred to be used for
 7 Kelley's benefit, rather than simply being held in trust or impound for the benefit of
 8 escrow companies or borrowers. The fact that the Government would need to call a
 9 witness from Davis Wright Tremaine again raises concerns considered in *Evanson* and
 10 *Swafford*, since Mr. Bartlett either could be that witness or could be required to cross
 11 examine a representative from his own firm, and since the mere fact of a Davis Wright
 12 Tremaine employee testifying would implicate the concerns about Mr. Bartlett and his
 13 firm serving as both advocate and witness.

14 For these reasons, the Government believes that the Court should inquire into
 15 whether Mr. Bartlett, Mr. McCallum, or any other lawyer at either of their firms provided
 16 Kelley advice relating to his decision to pay \$908,397 from the Blackstone International
 17 account at Vanguard to the Davis Wright Tremaine trust account as a retainer, and
 18 \$447,421 from that account to the United States Government as a supposed advance
 19 payment of taxes. The Court also should inquire whether Kelley believed that he
 20 received any such advice, expressly or implicitly. In the event that the Court determines
 21 that any such lawyer provided such advice, or that Kelley believes he received such
 22 advice, the Court should determine whether Kelley intends to pursue an advice-of-
 23 counsel defense or is willing to waive such a defense, and also whether Kelley is willing
 24 to waive any conflict.

25 Finally, the Court should permit the parties an opportunity to brief the impact that
 26 the facts developed by its inquiry have on defense counsel's ability to continue to
 27 represent Kelley. The Court should permit such additional briefing, because the impact
 28 of the conflict necessarily will depend upon facts yet to be developed, including the

1 nature of any advice, which attorney gave any advice at issue, and Kelley's willingness to
 2 waive any conflict.

3 **2. Other Potential Conflicts of Interest**

4 In addition to inquiring into the facts relating to the \$908,397 payment, the Court
 5 should inquire into two other areas that also might give rise to conflicts of interest, and
 6 into Kelley's willingness to waive any such conflicts.

7 First, the Court should inquire into whether Mr. Bartlett or any other attorney at
 8 Davis Wright Tremaine provided Mr. Kelley any advice relating to any of the
 9 withdrawals of \$245,000 in 2013, 2014, or 2015, or to Mr. Kelley's declaration of that
 10 amount as income on Blackstone's 2013 tax return. These actions are a continuation of
 11 Kelley's conduct in failing to declare as income money that he stole in 2006 through
 12 2008, and in falsely representing to IRS Special Agents in 2013 that he was drawing
 13 down the money at Vanguard beginning in 2011 for supposed ongoing work on
 14 reconveyances.

15 As a result, in the event that either Mr. Bartlett or another attorney at Davis Wright
 16 Tremaine gave any such advice, Kelley arguably could assert an advice-of-counsel
 17 defense. As a result, Mr. Bartlett could be placed in a position in which he was both an
 18 advocate and a witness, or was an unsworn witness. Therefore, the Court should inquire
 19 into whether Mr. Bartlett or any other attorney at Davis Wright Tremaine provided any
 20 advice concerning these subjects, whether Kelley intends to pursue an advice-of-counsel
 21 defense incorporating any such advice, whether he is willing to waive such a defense, and
 22 whether he is willing to waive any conflict.

23 Second, the Court should inquire into any possible conflicts stemming from Mr.
 24 Bartlett's prior representation of Kelley's wife. Although the Government is not aware of
 25 any specific conflict that is likely to arise from that representation, the fact that a
 26 defendant's lawyer previously has represented a witness may give rise to issues where the
 27 lawyer's ethical obligations to the witness limit the lawyer's ability to represent a
 28 defendant (for example, by limiting the lawyer's ability to use information obtained from

1 the witness, or to cross-examine the witness). *See generally* Washington Rules of
2 Professional Conduct 1.6(a) (providing that a lawyer “shall not reveal information
3 relating to the representation of a client unless the client gives informed consent”); 1.9(a),
4 (c) (providing that a lawyer “who has formerly represented a client in a matter shall not
5 thereafter represent another person in the same or a substantially related matter in which
6 that person’s interests are materially adverse to the interests of the former client unless
7 the former client gives informed consent, confirmed in writing” and “shall not [] use
8 information relating to the representation to the disadvantage of the former client except
9 as these Rules would permit or require”).

10 As a result, the Court should inquire concerning the scope of Mr. Bartlett’s prior
11 representation of Kelley’s wife. The Court also should inquire of Mr. Bartlett and of
12 Kelley regarding any possible conflict that they believe might arise from that
13 representation. Finally, the Court should inquire as to Kelley’s and his wife’s willingness
14 to waive any potential conflict of interest.

15 **IV. CONCLUSION**

16 For the foregoing reasons, the Court should conduct an inquiry into Kelley’s
17 counsel’s potential conflicts of interest relating to Kelley’s recent payments of \$908,397
18 to Davis Wright Tremaine and \$447,421 to the United States Treasury. The Court also
19 should inquire into the others issues set forth in Part III.B.2. Based upon the results
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1 of those inquiries, the Court then should permit the parties the opportunity to brief the
2 impact of any conflicts on defense counsel's ability to continue to represent Kelley.

3 DATED: this 26th day of May, 2015.
4

5 Respectfully submitted,
6

7 ANNETTE L. HAYES
United States Attorney

8 s/ Andrew C. Friedman
9 ANDREW C. FRIEDMAN
10 Assistant United States Attorney

11 s/ Kathryn Kim Frierson
12 KATHERYN KIM FRIERSON
13 Assistant United States Attorney

14 s/ Arlen R. Storm
15 ARLEN R. STORM
16 Assistant United States Attorney

17 700 Stewart Street, Suite 5220
18 Seattle, Washington 98101-1271
Telephone: (206) 553-2277
19 Fax: (206) 553-0755
E-mail: Andrew.Friedman@usdoj.gov
Katheryn.K.Frierson@usdoj.gov
Arlen.Storm@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via e-mail and/or telefax.

s/ Lissette Duran-Leutz
Lissette Duran-Leutz
Paralegal Specialist
United States Attorney's Office
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Telephone: (206) 553-7234
Fax: (206) 553-2502
E-mail: Lissette.I.Duran-Leutz@usdoj.gov